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EXAMINER

GRAYSAY, TAMARA L

ART UNIT PAPER NUMBER

3636

DATE MAILED: 09/15/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No. 10/765,935	Applicant(s) WILLIAMS, ROGER	
	Examiner Tamara L. Graysay	Art Unit 3636	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 06 July 2006.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 29 January 2004 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### *Preliminary Matter*

1. The Rimback reference (US-D386652), applied in the previous Office action, was not properly cited in the Office action or on the Notice of References Cited, form PTO-892. The examiner acknowledges with appreciation applicant's reply that properly refers to the Rimback reference (US-D386652).

The Rimback reference is properly cited on the Notice of References Cited, form PTO-892, attached hereto.

### *Drawings*

2. The drawings are objected to because of the following:
- Reference character "28" (page 9, line 3) is not depicted in the figures (i.e., FIG. 2).
  - The section line and the figure number in which the section is depicted should be the same (i.e., A-A should be 4-4 in FIG. 3). Appropriate correction is required to the brief description of FIG. 4.
  - FIG. 3: The lead line for reference character 56 should be directed to the longitudinal bore, not the axis line (e.g., see page 10, line 9).
  - Reference character "57" (page 11, line 29) is not depicted in the figures (i.e., FIG. 5).
  - FIG. 6: Reference character "48" should be 44, as mentioned at the top of page 12.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be

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labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

### *Specification*

3. The disclosure is objected to because of the following informalities:

- Page 12, line 13: [[described]] should be describes

Appropriate correction is required.

### *Claim Objections*

4. Claims 1 and 4 are objected to because of the following informalities:

- Claim 1, line 5: [[situate]] should be situated
- Claim 4, line 3: [[adapters]] should be adapted

Appropriate correction is required.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

5. Claims 1, 5, 8, 12, 15 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Klingberg (US-3559338).

Claims 1 and 15: A retainer wall system that is flexibly conformable and adapted to be affixed to the ground in a desired conformed position, comprising: a plurality of discrete wall segments (edging structure 10; FIG. 2; three blocks 11 form the edging structure 10; 2:42-45), each having releasable coupling means situate at opposed ends thereof to permit releasable interlocked coupling of each wall segments together to form a retainer wall (stakes 22 adjacent apex 20 of adjacent ends of the edging structures 10 as depicted in FIG. 1 and 2 comprise releasable coupling means, as broadly recited, insofar as the claim is not in “means for” language and the abutting nature of Klingberg achieves the function of releasable interlocked coupling of the adjacent edging structures 10 because the wall system of Klingberg is unbroken as depicted in FIGS. 1, 2); each of the said wall segments comprising a plurality of substantially vertical elongate members arranged in parallel, substantially mutually adjacent position, (blocks 11 are vertically elongate members arranged in parallel) each said vertical member having resiliently flexible web means flexibly coupling each said vertical member to an adjacent vertical member so as to permit flexible bending of each said wall segments about a vertical axis therethrough

to said desired conformed position (between adjacent blocks are web means in the form of hinge means 12); one or more of said plurality of vertical elongate members having longitudinal bore means extending substantially parallel to said vertical axis (FIG. 3, 5; the stakes 22 extend through blocks 11 which are hollow thereby forming a longitudinal bore, as broadly recited); and elongate ground fixation means (stakes 22), adapted to be inserted through said longitudinal bore means and into the ground (e.g., FIG. 3) so as to retain said wall segments in said desired conformed position.

Claims 5 and 19: The coupling means (stakes 22 and opposing ends of adjacent wall structures) permit interlocked pivotable coupling insofar as the adjacent wall structures are movable relative to each other for positioning in the particular application (FIG. 1). As noted in claim 1 above stakes 22 adjacent apex 20 of adjacent ends of the edging structures 10 as depicted in FIG. 1 and 2 comprise releasable coupling means, as broadly recited, insofar as the claim is not in "means for" language and the abutting nature of Klingberg achieves the function of releasable interlocked coupling of the adjacent edging structures 10 because the wall system of Klingberg is unbroken as depicted in FIGS. 1, 2.

Claims 8 and 12: Klingberg is a "kit" as broadly recited insofar as the edging structure is used in combination with each other to form a wall as depicted in FIG. 1.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 2, 9 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Klingberg (US-3559338) as applied to claims 1, 8, and 15 above, and further in view of Novak (US-D276494).

Claims 2, 9 and 16: Klingberg discloses a longitudinal bore in the vertical members insofar as the vertical members (blocks 11) are hollow (FIG. 4, 5).

Klingberg lacks the vertical members comprising elongate cylindrical members.

Novak suggests the use of elongate cylindrical members for an edging. It is well settled that the shape of an element would have been a matter of choice which a person of ordinary skill in the art would have found obvious absent persuasive evidence that the particular configuration of the claimed container was significant. In re Dailey, 357 F.2d 669, 149 USPQ 47 (CCPA 1966).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the shape of the angular vertical members of Klingberg to be elongate cylindrical members, such as suggested by the elongate cylindrical members of Novak, as a matter of design choice based on the aesthetic nature and use of the wall system.

7. Claims 3 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Klingberg (US-3559338) as applied to claims 1 and 15 above, and further in view of Gaston (US-6449897).

Claims 3 and 17: Klingberg discloses the wall structure of a molded plastic and the like (1:59-61) but is silent as to the particular type of plastic.

Gaston teaches the use of polyethylene for flexible landscape edging (e.g., 1:50-52). Such an arrangement is suggestion for substituting a known type of plastic to provide a flexible edging. In re Leshin, 227 F.2d 197, 125 USPQ 416 (CCPA 1960) (selection of a known plastic to make a container of a type made of plastics prior to the invention was held to be obvious).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the wall structure of Klingberg to be molded of polyethylene, such as suggested by Gaston, in order to provide a flexible molded structure.



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8. Claims 4, 11 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Klingberg (US-3559338) as applied to claims 1, 8, and 15 above, and further in view of Gaston (US-6012254).

Claims 4, 11 and 18: Klingberg is silent as to the particular material used for the ground fixation means (stake 22).

Steel is a known material used for ground fixation means (e.g., FIG. 11; anchoring member 12 may be formed of steel). Such an arrangement is suggestion to form the ground fixation means of Klingberg of steel in order to drive the fixation means into the ground to secure the wall structure to the ground. The selection of a known material based on its suitability for its intended use supported a *prima facie* obviousness determination in *Sinclair & Carroll Co. v. Interchemical Corp.*, 325 U.S. 327, 65 USPQ 297 (1945).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the ground fixation means of Klingberg to be steel, such as suggested by Gaston, in order to provide a flexible molded structure.

9. Claims 6 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Klingberg (US-3559338) as applied to claims 1 and 8 above, and further in view of Novak (US-D276494) and Gaston (US-6449897).

Claims 6 and 13: Klingberg discloses a longitudinal bore in the vertical members insofar as the vertical members (blocks 11) are hollow (FIG. 4, 5). Klingberg discloses the wall

structure of a molded plastic and the like (1:59-61) but is silent as to the particular type of plastic.

Klingberg lacks the vertical members comprising elongate cylindrical members having an imitation wood grain thereon and the vertical members of polypropylene or polyethylene plastic.

Novak suggests the use of elongate cylindrical members for an edging. It is well settled that the shape of an element would have been a matter of choice which a person of ordinary skill in the art would have found obvious absent persuasive evidence that the particular configuration of the claimed container was significant. In re Dailey, 357 F.2d 669, 149 USPQ 47 (CCPA 1966).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the shape of the angular vertical members of Klingberg to be elongate cylindrical members, such as suggested by the elongate cylindrical members of Novak, as a matter of design choice based on the aesthetic nature and use of the wall system. The particular pattern on the exterior of the cylindrical members is not a patentable distinction over the prior art device and such an arrangement is a matter of design choice, generally recognized as being within the level of ordinary skill in the art.

Further, Gaston teaches the use of polyethylene for flexible landscape edging (e.g., 1: 50-52). Such an arrangement is suggestion for substituting a known type of plastic to provide a flexible edging. In re Leshin, 227 F.2d 197, 125 USPQ 416 (CCPA 1960) (selection of a known plastic to make a container of a type made of plastics prior to the invention was held to be obvious).

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It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify further the wall structure of Klingberg and Novak to be molded of polyethylene, such as suggested by Gaston, in order to provide a flexible molded structure.

10. Claims 7/1, 7/5, 14/8, 14/12, 20/15 and 20/19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Klingberg (US-3559338) as applied to claims 1, 5, 8, 12, 15 and 19 above, and further in view of Rimback (US-D386652).

Claims 7/1, 7/5, 14/8, 14/12, 20/15 and 20/19: Rimback teaches a coupling means (FIG. 1, 2) having a longitudinal bore means which ground fixation means may be inserted therethrough to couple opposed ends of wall segments together in order to prevent the adjacent ends from separating.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Klingberg to include a coupling means having a longitudinal bore means which ground fixation means may be inserted therethrough to couple opposed ends of wall segments together, such as suggested by Rimback, in order to couple opposed ends of the wall segments together to prevent the adjacent ends from separating.

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11. Claims 7/6 and 14/13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Klingberg (US-3559338), Novak (US-D276494) and Gaston (US-6449897) as applied to claims 6 and 13 above, and further in view of Rimback (US-D386652).

Claims 7/6 and 14/13: Rimback teaches a coupling means (FIG. 1, 2) having a longitudinal bore means which ground fixation means may be inserted therethrough to couple opposed ends of wall segments together in order to prevent the adjacent ends from separating.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the Klingberg, Novak, and Gaston combination to include a coupling means having a longitudinal bore means which ground fixation means may be inserted therethrough to couple opposed ends of wall segments together, such as suggested by Rimback, in order to couple opposed ends of the wall segments together to prevent the adjacent ends from separating.

12. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Klingberg (US-3559338) and Novak (US-D276494) as applied to claim 9 above, and further in view of Gaston (US-6449897).

Claim 10: Klingberg discloses the wall structure of a molded plastic and the like (1:59-61) but is silent as to the particular type of plastic.

Gaston teaches the use of polyethylene for flexible landscape edging (e.g., 1:50-52). Such an arrangement is suggestion for substituting a known type of plastic to

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provide a flexible edging. In *re Leshin*, 227 F.2d 197, 125 USPQ 416 (CCPA 1960) (selection of a known plastic to make a container of a type made of plastics prior to the invention was held to be obvious).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the wall structure of Klingberg and Novak to be molded of polyethylene, such as suggested by Gaston, in order to provide a flexible molded structure.

### ***Response to Arguments***

13. Applicant's arguments filed 06 July 2006 have been fully considered but they are not persuasive.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., mortis and tenon arrangement; spigot or mating dowel arrangement; or insertable pint and hinge arrangement) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). While applicant has argued structural differences of the disclosure, applicant has neither invoked 35 U.S.C. 112, sixth paragraph, nor recited proper "means for" language in claims 1, 8 or 15. As noted in the rejections above, Klingberg discloses the releasable couple connection, as broadly recited, by way of the stakes that extend through the ends

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of the wall structures (comprised of three adjacent blocks) thus holding them in releasable interlocking connection (FIG. 1).

In response to applicant's argument that Klingberg shows a one-piece integrally formed driveway edging, it is noted that Klingberg discloses a plurality of edging pieces comprised of three blocks (three blocks 11 form the edging structure 10; 2:42-45).

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Tamara L. Graysay whose telephone number is 571-272-6728. The examiner can normally be reached on Mon - Fri from 8:30am to 5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter M. Cuomo, can be reached on 571-272-6856. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Tamara L. Graysay

Examiner

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